SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

STEVEN G. SCHULMAN, Petitioner, -against- MILBERG LLP, Respondent.	Index No. 106549/2009

RESPONDENT MILBERG LLP'S MEMORANDUM OF LAW IN OPPOSITION TO MOTIONFOR INJUNCTIVE RELIEF

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Respondent Milberg LLP ("Milberg"), by and through its attorneys Morrison Cohen LLP, hereby submit this memorandum of law in opposition to the motion (the "Motion') of Petitioner Steven G. Schulman ("Schulman") for injunctive relief.

RELEVANT FACTUAL BACKGROUND

A. Schulman's Criminal Conduct

Petitioner Schulman is a wealthy former partner of a Milberg[1] predecessor. Milberg was, at one time, the most successful and powerful class action firm in the country. Schulman earned fabulous wealth from Milberg, but apparently was not content with the millions that he earned. To increase his compensation, Schulman abused the trust of his clients, the courts and his partners and engaged in a long-term kickback scheme. As Schulman effectively admitted in his plea agreement, he lied to many courts for many years, concealing the kickbacks he secretly paid that allowed him to obtain leadership positions in class actions and garner ever-greater income for himself. Schulman committed these crimes for his own personal enrichment, in callous disregard of his duties to the courts, his clients and his partners. When Schulman's fraudulent scheme was finally discovered, he pled guilty to felony racketeering. Schulman was immediately disbarred from the practice of law, and went to prison for his crimes. Having been disbarred, Schulman is not permitted to practice law.[2] *See Matter of Schulman*, 51 A.D.3d 220, 854 N.Y.S.2d 57 (1st Dep't 2008)

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[1] The law firm partnership known as Milberg LLP has undergone numerous material and structural changes, including by changing its name several times over several decades. For ease of references the firm is referred to in this memorandum as Milberg, although the name has been different at various times.

[2] Schulman states in his papers that he is "retired." (Schulman Mem. at 2). Schulman's "retirement" resulted from his permanent disbarment from the practice of law. Since his release from prison, Schulman has never been readmitted. His LinkedIn profile states that he ceased working at a law firm, Milberg, in 2006. *See* https://www.linkedin.com/in/steven-schulman-

B. Background Of Schulman's Declaratory Judgment

Before he went to prison, Schulman withdrew from Milberg. Schulman thereafter claimed that Milberg owed Schulman payments under the Milberg Partnership Agreement, dated as of January 1, 1991 (the "Partnership Agreement"). In 2008, Schulman and Milberg participated in an arbitration in connection with Schulman's claims (the "Arbitration"). On November 6, 2008, Schulman obtained an arbitration award against Milberg setting forth the amounts that Milberg owed Schulman under the Partnership Agreement, including for return of his capital (the "Arbitration Award").

On August 14, 2009, Schulman reduced the Arbitration Award to the declaratory judgment at issue on this Motion (the "Judgment"). While the Judgment states the total amount Schulman is entitled to under the Partnership Agreement, the Judgment directs these payments to be made over time and in accordance with the terms of the Partnership Agreement. Based on Milberg's records, Schulman received all payments due through November 2018. All told, Milberg has paid Schulman over $10 million since Schulman's conviction and imprisonment.

C. Milberg's Struggles in the Wake of Schulman's Crimes

After Schulman and others went to prison, the remaining partners of Milberg were left to pick up the pieces. They worked diligently to serve Milberg's remaining clients. Schulman's well-publicized wrongdoing made it more difficult for Milberg to achieve the type of profitability that Schulman had achieved through bribery and kickbacks. Competitors of Milberg sought to persuade courts and clients that Milberg was not suited for leadership positions, particularly in the types of cases that historically had been the lifeblood of Milberg and which had, at one time, generated large fees. Thus, as a direct result of Schulman's crimes (and

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806b011b. According to his LinkedIn profile, Schulman is the President of Diversified Professional Resources LLC.

the crimes of his cohorts), Milberg's profitability began to slowly and steadily decline, and Milberg resorted to borrowing to finance the prosecution of its contingency-fee cases. These borrowings were also used to pay Schulman and other former partners. While Milberg remained fully committed and able to serve the interests of all of its clients, distributions available for actively-working partners steadily decreased – meanwhile, Schulman and other former partners, who were no longer affiliated with the firm, continued to receive payments under the Partnership Agreement.

D. Milberg's Strategic Alliance

By 2017, Milberg had an inventory of pending contingent-fee cases (the "Milberg Cases"), but these cases would require many years and substantial financial investment to bring to trial or settlement. The significant debt that Milberg had incurred to finance its operations and pay former partners had matured. So that it could better serve the interests of its clients, Milberg sought a strategic partner to provide a more stable platform to manage, finance and prosecute the Milberg Cases for the benefit of Milberg's clients. Pursuant to an assignment and assumption agreement dated September 2017 (the "AAA"), Milberg agreed to assign certain assets to Milberg Tadler Phillips Grossman LLP ("MTPG") as part of a strategic partnership.

Pursuant to the AAA, Milberg assigned substantially all of its assets to MTPG. The Milberg assets assigned to MTPG pursuant to the AAA, included the active Milberg Cases and all rights concerning "engagements and client relationships," as well as "[a]ll client receivables for disbursements" in connection with all but three of the Milberg Cases. Corwin Aff, Ex. I, Section 2 & Schedule B. In accordance with the AAA, Milberg's bank accounts relating to any of Milberg's "engagements and client relationships" were thus assigned to MTPG.

In consideration for Milberg's assignment of the Milberg Cases and other assets under the AAA, MTPG provided valuable consideration to Milberg, agreeing to (among other things): (1) assume or resolve certain contractual obligations of Milberg specified in the Assignment Agreement, (2) to resolve approximately $5 million of Milberg's then-outstanding accounts payable, and (3) to grant Milberg LLP a 49% interest in MTPG. (Corwin Aff. Ex. I, Section 1).

As part of the AAA, Milberg received an interest in the MTPG partnership. To the extent that MTPG generates revenues and eventually makes distributions to its partners, Milberg will receive distributions along with other partners. At the present time, however, MTPG must apply any revenues it generates to prosecute cases on behalf of its clients. While MTPG has the ability both in the short and long term to meet its obligations to fully and zealously represent its clients, and to meet its other financial obligations necessary to the representation of it clients (such as rents, salaries, case disbursements and other operating expenses), MTPG has not made any distributions of its profits to any of its partners (including Milberg) since its inception.[3] This is so because contingency cases have a lengthy timeline (often 4 to 5 years, some as long as a decade) to resolution and require enormous financial investment. As a law firm, MTPG's first duty must be to its clients, and not to wealthy former partners seeking to squeeze the last nickel possible out of Milberg.[4]

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[3] Two equity partners of MTPG who work full time prosecuting MTPG cases for MTPG's clients have received a modest salary for their work.

[4] MTPG does expect in the coming years to make distributions to its partners, including Milberg, at which time Milberg may use the funds to pay any creditors it may have (including Schulman and other former partners).

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO MAKE ANY MODIFICATION TO THE JUDGMENT BECAUSE THIS IS MERELY AN ACTION PURSUANT TO CPLR ARTICLE 75 AND NOT A PLENARY ACTION

This is not a plenary action; it is merely an action to confirm an arbitration award under CPLR § 7514. While the Judgment provided, at one time, for the deposit of $500,000 into escrow, that directive has long since expired:

> Milberg shall establish and fund an escrow account in the amount of $500,000.00 by April 30, 2009 **which shall remain in place until April 30, 2010.**

Ex. A, p. 2.

Nothing in the Arbitration Award provides for the reinstatement of this escrow after April 30, 2010, and this Court is without power to modify the Arbitration Award. CPLR 7511(c), which governs the modification of arbitration awards severely limits the circumstances under which modification is available. CPLR § 7511(c) provides only three grounds for modifying an arbitration award:

> 1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or
>
> 2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
>
> 3. the award is imperfect in a matter of form, not affecting the merits of the controversy.

CPLR § 7511(c).

Schulman has not articulated any ground for relief under any of the three provisions CPLR § 7511(c). Accordingly, there is simply no legal basis to modify the Arbitration Award and the corresponding Judgment as Schulman requests. Should Schulman

wish to modify the Judgment in any respect, he must commence an arbitration proceeding as required under Article 11 of the Partnership Agreement.

While Schulman cites to CPLR § 5240 as the basis to modify the Judgment, that section simply provides the Court with power to "issue an order denying, limiting, conditioning, regulating extending or modifying the use of **any enforcement procedure**." CPLR § 5240. There is no enforcement procedure in Article 52 of the CPLR that provides for an escrow account to be established for the payment of future amounts that may or may not come due under a judgment. This section is simply inapplicable here.

Indeed, none of the enforcement procedures of Article 52 should apply here, because the Judgment at issue here is simply a declaratory judgment. While the Judgment states a total amount due to Schulman, it does not direct payment of that specific amount; instead, the Judgment directs that it "shall be paid by Milberg to Schulman on a monthly basis pursuant to the Milberg Partnership Agreement. The Judgment does not specify any amount due each month, and the Partnership Agreement contains a complex formula for calculating any payments due – and capping those payments – as well as numerous other provisions that govern the payments due to former partners like Schulman. Indeed, the Partnership Agreement assumes that there is Partnership Net Income (as defined in Article 5 of the Partnership Agreement) available to pay the amounts due (notwithstanding that for many years Milberg borrowed money to pay its former partners). Currently, Milberg has no Partnership Net Income to pay Schulman or any other Milberg creditors.

II. PETITIONER SHOULD NOT BE PERMITTED TO RE-SERVE RESTRAINING NOTICES ON MTPG SIGNATURE BANK BECAUSE THEY DO NOT HOLD ANY ASSETS OF MILBERG LLP

The second point of Schulman's brief in support of his Motion seeks permission to serve additional restraining notices on Milberg, MTPG and Signature Bank. As Schulman acknowledges, CPLR § 5222(c) does not permit the service of successive restraining notices upon the same person, because these devices can be used as instruments to harass – which is precisely what Schulman seeks to do here. Schulman seeks to serve restraints on Signature Bank and MTPG solely in an effort to harass and annoy MTPG. Schulman is an extremely wealthy person, having earned tens of millions of dollars while a partner at Milberg prior to his plea and having received approximately $10 million more after his departure from the firm. Any claim by him as to the need for money of this magnitude is implausible. There is no urgency for him to collect the approximately $100,000 he claims that Milberg currently owes him. By serving restraining notices on MTPG and Signature Bank, Schulman hopes to interfere with MTPG's representation of its clients to such an extent that MTPG is forced to divert resources necessary to represent its clients in order to pay ransom to Schulman. The Court should not countenance this harassment.

As the Court of Appeals has stated, under CPLR § 5240, this Court has "discretionary power to control and regulate the enforcement of a money judgment under article 52 to prevent **'unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.'**" *Guardian Loan Co. v. Early*, 47 N.Y.2d 515, 519, 419 N.Y.S.2d 56, 59 (1979). This Court should not permit Schulman to serve another round of restraining notices on MTPG or Signature Bank, as they are designed only to harass MTPG and interfere with MTPG's representation of its clients, in the hope that MTPG will pay any debts

Schulman claims are owed by Milberg. This is an abuse of Article 52 of the CPLR, and the Court should deny Schulman's request.

Pursuant to CPLR § 5222(b), a:

> restraining notice served upon a person other than the judgment debtor or obligor is effective only if, at the time of service, he or she owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property in which he or she knows or has reason to believe the judgment debtor or obligor has an interest. . .

A restraining notice is ineffective where the recipient is not in possession of property belonging to the judgment debtor. *Verizon New England Inc. v. Transcom Enhanced Servs., Inc.*, 98 A.D.3d 203, 204, 948 N.Y.S.2d 245, 246 (1st Dep't 2012), *aff'd* 21 N.Y.3d 66, 967 N.Y.S.2d 883 (2013). In addition, restraining notices "only reach property and debts with [ ] a connection to the judgment debtor." Thus, "if third parties do not have property or debts in which the judgment debtor has an interest, the restraining notices are not effective." *JSC Foreign Econ. Ass'n Technostroyexport v. International Dev. & Trade Servs., Inc.*, 295 F. Supp. 2d 366, 391 (S.D.N.Y. 2003) (internal quotation marks omitted); *see also AG Worldwide v. Red Cube Mgmt. AG*, No. 01 Civ. 1228, 2002 U.S. Dist. LEXIS 4398, at *26 (S.D.N.Y. March 14, 2002) (restraining notices issued pursuant to CPLR § 5222 "only reach property and debts with . . . a connection to the judgment debtor. If the third parties do not have property or debts in which the judgment debtor has an interest, the restraining notices are not effective.").

Thus, "[r]estraining notices will be vacated where they fail to allege with sufficient specificity the alleged interest that the judgment debtor has in the assets sought to be restrained." *Id; see also Mohawk Leather Co. v. Marine Midland Bank, N.A.*, 125 A.D.2d 844, 846, 509 N.Y.S.2d 952, 953 (3d Dep't 1986) (third party restraining notice is an "overreaching use of CPLR 5222" where judgment creditor did not make a prima facie showing of the alter ego

liability of the restrained party); *Market Meats, Inc. v. Butchery NYC Inc.*, No. 303966/2014, 2015 N.Y. Slip Op. 30216(U), at *3 (Sup. Ct. Bronx Cty. Jan. 9, 2015) (vacating restraining notice where movant stated "that no entity other than [movant] possesses an interest in the funds contained in its bank accounts"); *JSC*, 295 F. Supp. 2d at 393 (CPLR § 5222 does not permit the restraint of a non-party's assets "until [its] alleged alter ego status has been adjudicated and [its] liability for the previous judgment determined.").

Schulman has simply not articulated a sufficient basis to serve yet another round of restraining notices on MTPG and Signature Bank; accordingly, his request should be denied.

III. SCHULMAN SHOULD NOT BE PERMITTED TO RE-SERVE INFORMATION SUBPOENAS ON MTPG; ANY DISCOVERY SOUGHT BY SCHULMAN IN CONNECTION WITH HIS JUDGMENT SHOULD BE SUPERVISED BY A DISCOVERY MASTER PURSUANT TO CPLR § 5240

Schulman should not be permitted to re-serve information subpoenas on MTPG, because MTPG does not have any property of Milberg. As part of the AAA, MTPG received assets from Milberg *and paid for those assets.* In exchange for Milberg's assignment of the Milberg Cases and other assets under the AAA, MTPG provided valuable consideration, including the agreement to: (1) assume or satisfy certain contractual obligations of Milberg specified in the Assignment Agreement, (2) resolve approximately $5 million of Milberg's then-outstanding accounts payable, and (3) grant Milberg LLP a 49% interest in MTPG. Currently, MTPG owes Milberg only potential future profits if and when the pending contingency fee cases are settled or brought to verdict. Currently, MTPG has not made any distributions of profits to any of its partners (including Milberg), and does not expect to make any distributions in the near future, as most of the pending cases are years away from resolution.

Pursuant to CPLR §§ 5223 and 5224, disclosure sought from persons or entities other than the judgment debtor is limited to information about the extent or whereabouts of the

judgment debtor's assets available to satisfy the judgment. *See Lupe Dev. Partners, LLC v. Pacific Flats I, LLC*, No. 108168/01, 2013 N.Y. Slip Op. 31891(U), at *3-4 (Sup. Ct. N.Y. Cty. Aug. 9, 2013) (quashing information subpoena where "none of the requests seeks information about the assets of the judgment debtor," and explaining that non-party "disclosure must be limited to information about . . . assets which are applicable in satisfaction of the judgment, and not to . . . individually owned property, which may not be so applied.") (citation omitted); *Estate of Ungar v. The Palestinian Auth.*, No. 105521/2005, 2009 N.Y. Slip Op. 32938(U), at *8 (Sup. Ct. N.Y. Cty. Dec. 9, 2009) (quashing enforcement of subpoena because information sought was not "directed at uncovering information about the judgment-debtors' property").

IV. MTPG IS NOT A SUCCESSOR OF MILBERG LLP, AND SCHULMAN'S EXTRAORDINARY CLAIM FOR A SUMMARY DETERMINATION OF SUCCCESSOR LIABILITY CANNOT BE DETERMINED ON THIS RECORD

Based on little more than allegations he filed in a complaint in another action, Schulman asks this Court to grant the extraordinary remedy of naming MTPG a successor to Milberg, and allowing the Judgment against Milberg to be enforced against MTPG. MTPG merely acquired assets of Milberg, for which Milberg paid – both by satisfying Milberg liabilities and by granting Milberg a 49% interest in MTPG. The law in New York is well settled that an asset purchaser does not become liable for an asset seller's liabilities simply by buying the seller's assets. *See In re N.Y. City Asbestos Litig.*, 15 A.D.3d 254, 255, 789 N.Y.S.2d 484, 485-86 (1st Dep't 2005); *Desclafani v. Pave-Mark Corp.*, No. 07 Civ. 4639, 2008 U.S. Dist. LEXIS 64672, at *13 (S.D.N.Y. Aug. 22, 2008). An unwarranted attempt to impose successor liability such as Schulman seeks to do here runs counter to general principles of law and public policy.

The complaint in the action that Schulman has commenced in an attempt to impose successor liability -- *Schulman v. Milberg Tadler Phillips Grossman LLP, et al.*, Index

No. 650025/2019 (the "Successor Action") – was only recently filed. Issue has not even been joined in the Successor Action, and no party has had an opportunity to take discovery. If there is any successor liability to be imposed – and there is not – that liability will be determined in the Successor Action, which should be permitted to run its course.

Additionally, the documents submitted by Schulman to prove his case show that there was no effort to defraud creditors, as required for successor liability: Milberg retained an extremely valuable asset – a 49% interest in MTPG, which should generate revenues in the future. Aside from the unassailable proof that Milberg received consideration for the assets it sold, the law is clear that successor liability is a fact-intensive inquiry and not to be imposed lightly. *See Sweatland v. Park Corp.*, 181 A.D.2d 243, 246, 587 N.Y.S.2d 54, 56 (4th Dep't 1992) ("It is apparent from the nature of the inquiry required that the court is to make, on a case-by-case basis, an analysis of the weight and impact of a multitude of factors that relate to the corporate creation, succession, dissolution, and successorship.").

Permitting Schulman to serve restraining notices on MTPG would pose a grave injustice. MTPG is an operating law firm, handling dozens of cases on behalf of innumerable clients. Allowing Schulman to restrain MTPG's funds and bring MTPG's operations to a halt and would pose a grave danger to MTPG's ability to continue to represent its clients. For this reason, Schulman's application should be denied.

V. SCHULMAN SEEKS ONLY MONEY DAMAGES AND IS NOT ENTITLED TO INJUNCTIVE RELIEF

The final point of Schulman's brief in support of his Motion alleges irreparable harm. But Schulman has asserted only money damages – which are the antithesis of irreparable harm. Courts have consistently held that a plaintiff is not entitled to a preliminary injunction where the primary relief sought is monetary damages. *See Derfner Mgt. Inc. v. Lenhill Realty Corp.*, 105

A.D.3d 683, 684, 964 N.Y.S.2d 132, 134 (1st Dep't 2013); *Broadway 500 W. Monroe Mezz II LLC v. Transwestern Mezzanine Realty Partners II, LLC*, 80 A.D.3d 483, 484, 915 N.Y.S.2d 248, 249 (1st Dep't 2011); *OraSure Tech., Inc. v. Prestige Brands Holdings, Inc.*, 42 A.D.3d 348, 348, 839 N.Y.S.2d 744, 745 (1st Dep't 2007). Schulman is an extremely wealthy man, having earned tens of millions from Milberg, including approximately $10 million since his departure from the firm and the loss of his license to practice law, *i.e.*, during a time when he made no positive contribution to Milberg whatsoever, but rather left the firm to manage in the aftermath he left behind. Schulman will not suffer irreparable harm if his motion is denied.

In addition, the equities here tip decidedly in Milberg's favor, not Schulman's. Milberg is dependent upon the successful prosecution of cases by MTPG in order to generate the income necessary to allow for distributions to MTPG partners, including Milberg. Should Schulman be permitted to choke off MTPG's funding and impede MTPG's ability to prosecute its case to fruition, both Milberg and Schulman will be harmed.

CONCLUSION

For the foregoing reasons, Milberg respectfully request that this Court deny the Motion and grant such other and further relief that this Court may deem just and proper.

Dated: New York, New York
January 28, 2019

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